

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Order Instituting Rulemaking to Establish
Policies and Cost Recovery Mechanisms for
Generation Procurement and Renewable
Resource Development.

Rulemaking 01-10-024

**ADMINISTRATIVE LAW JUDGE'S RULING
ON SAN DIEGO GAS & ELECTRIC COMPANY'S
MOTION TO AMEND PROTECTIVE ORDER**

This Ruling responds to the Motion of San Diego Gas & Electric Company (SDG&E) to Amend Protective Order, filed on October 7, 2003, and further addresses issues regarding the scope of, and access to, confidential information in this proceeding that were previously addressed in the Ruling of Administrative Law Judges (ALJs) Allen and Walwyn dated April 4, 2003 (the April 4 Ruling).

SDG&E's Motion

In its motion, SDG&E seeks an amendment to the Protective Order currently in effect in this proceeding, which was adopted by ALJ Allen on May 20, 2003, in order to ensure that it will encompass and include all confidential, proprietary and otherwise commercially sensitive and/or trade secret information provided by respondents to SDG&E's May 16, 2003 Request for Proposals for Grid Reliability Capacity (the SDG&E RFP). The specific proposal that SDG&E made in its Motion was to include in Section 3(b) of the

Protective Order, which defined the term “Protected Materials” a new subsection (F) that would read as follows:

“ . . . any filing, submittal, or testimony pertaining or relating to the bids submitted in response to SDG&E’s May 16, 2003, Grid Reliability Capacity RFP.”

The rationale for this requested amendment to the language of the Protective Order was that the responses to the SDG&E RFP would most likely include confidential, proprietary, commercially sensitive information and possibly including trade secret information of the respondents requiring some level of protection so that the respondents’ competitors and other market participants would not gain access to that information. SDG&E pointed out that in the actual language (in Section 9) of its RFP document, SDG&E agreed to maintain the confidentiality of all proposals submitted in response to the RFP, acknowledging, however, that SDG&E’s procurement Review Group (PRG) and Commission staff would need to have unfettered access to all bid information.

Responses to SDG&E’s Motion

The Independent Energy Producers’ Association (IEP) responded to SDG&E’s Motion in a filing dated October 21, 2003. At the Prehearing Conference in this proceeding held on October 31, 2003, the undersigned directed the parties to submit further Comments on SDG&E’s Motion by November 5, 2003. Timely Comments on SDG&E’s Motion were filed by Pacific Gas & Electric Company (PG&E), the Cogeneration Association of California and the Energy Producers and Users Coalition (CAC/EPUC), and the Nevada Hydro Company, Inc and the Elsinore Valley Municipal Water District (jointly, TNHC). Also, SDG&E itself filed Comments on IEP’s Response to its Motion, which further elaborated the basis for that Motion.

IEP, CAC/EPUC and THNC all express concern that there is a lack of transparency in the implementation by the investor-owned utilities (IOUs) of procurement policies, and argue that the trend of the IOUs is to “shield increasing amounts of information from public review under the guise of the information being confidential, proprietary, commercially sensitive and/or trade secrets.” (IEP Response, at 7.) Accordingly, in the view of these parties, approval of SDG&E’s proposed amendment to the existing Protective Order will “undermine attainment of open and competitive procurement because it will exacerbate the lack of transparency that already exists. “ (*Id.*, at 1.)

IEP, CAC/EPUC and THNC do recognize the importance of shielding from public review information that is legitimately commercially sensitive. However, IEP, CAC/EPUC and THNC point out that protection for such commercially sensitive information must have limits, and that the Commission should assure that the information that the IOUs seek to protect is truly confidential. Toward this end, these parties advocate that: (1) the Commission should develop guidelines on the types of information deemed proprietary, confidential and trade secret; and (2) the Commission must have in place appropriate procedures to allow parties to have access to commercially sensitive information, pursuant to Protective Order, so that all parties may meaningfully participate in the review of the IOUs’ procurement activities.

PG&E opposes the position of IEP (and, by necessary implication, supports that of SDG&E), even though it will severely limit PG&E’s own access to the information in this proceeding, because PG&E is a market participant. PG&E points out that “[r]equiring the IOUs to reveal market sensitive information may give an advantage to those with whom the utilities are negotiating, potentially

having a negative effect on the utilities' ability to obtain the most favorable power prices for customers." (PG&E Reply, at 2.)

In its own Comments on the IEP Response, SDG&E argues that it has been light-handed in the use of redactions in the documents it filed on October 7, 2003 in connection with its request for approval to enter into contracts, which resulted from its RFP process. According to SDG&E, IEP is doing nothing more than rearguing a position on which the Commission ruled against it months ago. SDG&E contends that it redacted "only that confidential, proprietary and commercially sensitive information absolutely necessary to protect" (SDG&E Comments, at 8) and that "there is ample unredacted information available to Market Participating Parties to determine how and why the RFP was constructed, how it was processed, how the bids were evaluated, and why certain bids were selected for final contracts." (SDG&E Comments at 9.) SDG&E's Comments also describe the SDG&E-specific information (as opposed to bidder information) in the filings accompanying its request for approval to enter into contracts that it requires to be kept confidential, and discuss the rationale for keeping this information confidential.

Discussion

(1) SDG&E's Motion

To the extent that SDG&E's Motion requests that bidder-provided information that was designated as confidential in bidder submittals in response to SDG&E's RFP be included within the category of "Protected Materials" for the purposes of this proceeding, this request is relatively straightforward. When the existing Protective Order was adopted, there was no pending request relating to an RFP submitted by any of the IOUs, and none of the parties sought to include bidder-provided confidential information within the scope of that category. Now

that this proceeding has expanded to include a review of the responses to SDG&E's RFP, there is no good reason not to expand the scope of the term, "Protected Materials," to include confidential or proprietary information submitted by the bidders to SDG&E's RFP.

However, SDG&E's Motion also appears to seek inclusion within the category of "Protected Materials" of certain materials that the bidders to SDG&E's RFP did not themselves designate as confidential. In this regard, TNHC complains (at page 2 of its Response) that it made no confidential designations on any portions of its response to the RFP, although SDG&E decided to treat many portions of that data as confidential in the documents it filed on October 7, 2003 in connection with its request for approval to enter into contracts resulting from its RFP process. In anticipatory response to this concern, SDG&E argues (at pages 9-10 of its Comments) that making this information available publicly "would disadvantage SDG&E in finalizing the contracts with all the bidders." SDG&E's rationale in this regard is weak and unsupported, and we agree with THNC that the Protective Order should cover only those portions of bids that bidders themselves specifically marked as such.

Accordingly, to the extent that SDG&E seeks to expand the scope of "Protected Materials" to include materials that the RFP bidders did not themselves deem to be confidential, SDG&E's Motion will be denied.

Since this Ruling grants SDG&E's Motion in part, and denies it in part, SDG&E must revise the redacted version of its October 7, 2003 submittals to un-redact all bidder-supplied information contained in those submittals that the bidders did not themselves designate as confidential, proprietary, commercially sensitive or trade secret.

(2) The Use of Confidential Data in This Proceeding

The foregoing resolution of the questions raised by SDG&E's Motion is not the end of the discussion. IEP, CAC/EPUC and TNHC have resuscitated some key policy concerns regarding the manner in which parties that have a stake in the IOUs' procurement processes should be able to participate in the Commission's proceedings that address those procurement processes. Specifically, there are two fundamental policy questions that the Commission, as well as the parties interested in the Commission's review of IOU procurement activities, should address. These are: (1) what types of information should be deemed proprietary, confidential and trade secret in connection with the Commission's proceedings that will review the IOUs' procurement-related activities; and (2) is there a way to allow parties to such proceedings who are market participants to have access to commercially sensitive information, pursuant to Protective Order, so that they may fully and meaningfully participate in those Commission proceedings that will review the IOUs' procurement-related activities.

In general, as to the first of these questions, the policy issues raised by the various parties in regard to SDG&E's Motion were previously addressed in the April 4 Ruling of ALJs Allen and Walwyn. However, other public information that has come to our attention since the issuance of the April 4 Ruling leads us to conclude that the Joint Parties, who evaluated the scope of material that should be considered confidential and recommended a framework (in a report submitted on March 19, 2003) for identifying the types of information that should, and should not, qualify for confidential treatment, may have been overly protective of certain types of information that might more appropriately have made publicly available.

It is beyond the scope of SDG&E's Motion, and this proceeding is too far along, to reopen the issues addressed in the April 4 Ruling at this point. However, the parties to this proceeding, and other interested parties, should re-examine the general framework that they proposed, which was adopted with only minor changes, in the April 4 Ruling. The Commission's forthcoming decision addressing short and long-term procurement planning will provide further guidance on this point.

Moreover, all of the parties (including but not limited to SDG&E), who have submitted confidential information in this proceeding (including but not limited to resource, capacity, load, planning or cost information), should be put on notice that if the information necessary for the Commission to reach a specific finding to support its decision in this matter is information that has been designated and treated, so far, as confidential, the Commission reserves the right under Pub. Util. Code § 583 to make that information public. Furthermore, to the extent that bidder-supplied information submitted in response to SDG&E's RFP that has been designated as confidential is required to be included in a specific finding to support the Commission's decision in this matter, the Commission may request SDG&E to seek the bidders' agreement to declassify that information.

(3) Meaningful Participation by Market Participants

As to the second of the questions posed above, it has been repeatedly stated by the undersigned that one of the objectives for this procurement proceeding's long-term planning process is to ensure that the public and interested parties can meaningfully participate in the proceeding and that the public can understand the basis for our decisions.

The existing Protective Order clearly allows full public participation occurring through organized consumer groups who can request and receive formal access to confidential information. However, for interested parties who are market participants, the fact of the opposition of IEP, CAC/EPUC and TNHC to SDG&E's Motion demonstrates the continuing tension between the competing needs, on the one hand, for open and transparent procurement processes and, on the other hand, to protect legitimate confidential, proprietary, commercially sensitive and trade secret information of companies participating in RFPs.

The relevant statute on this issue is Pub. Util. Code § 454.5(g), which reads:

(g) The commission shall adopt appropriate procedures to ensure the confidentiality of any market sensitive information submitted in an electrical corporation's proposed procurement plan or resulting from or related to its approved procurement plan, including, but not limited to, proposed or executed power purchase agreements, data request responses, or consultant reports, or any combination, provided that the Office of Ratepayer Advocates and other consumer groups that are nonmarket participants shall be provided access to this information under confidentiality procedures authorized by the commission.

This statute has two mandatory aspects: first, the Commission must adopt appropriate procedures to ensure the confidentiality of certain market sensitive information; and second, the Office of Ratepayer Advocates (ORA) and certain other consumer groups must be provided access to that same information under the adopted procedures. As was noted in the April 4 Ruling (*mimeo.*, at 4), those two requirements have already been satisfied, as the Commission has already adopted procedures to maintain confidentiality, and ORA and other consumer groups have obtained access to the information. We also found in the April 4 Ruling (*mimeo.*, at 17) that each utility had made the requested showing that its

long-term procurement plan allows for meaningful public participation in the long-term planning process.

However, insofar as the struggle over this issue has now been joined in the context of a specific set of proposed transactions, which has particular winners and losers, rather than in connection with a plan, which is inherently more generic, it is prudent to re-examine whether the process for protecting confidential information, in its current configuration, continues to be fair and reasonable for all interested parties.

Although the availability of confidential materials to ORA and consumer groups does provide for full participation for such groups in the procurement process, we are concerned that the inability of parties who are market participants to review materials relating to a particular procurement process, such as the SDG&E RFP, in any manner whatsoever could potentially compromise the rights of such parties. This is especially the case when a particular market participant is an unsuccessful bidder, like THNC in the SDG&E RFP process. In this particular context, the delicate balance between transparency and openness on the one hand, and the protection of legitimate confidential materials on the other, should tilt in favor of openness.

It is indisputable, as PG&E and SDG&E have pointed out, that proprietary, commercially sensitive and trade secret information (either the IOUs' own information or that of the bidders on their RFPs) that the IOUs provide to the Commission in connection with their procurement processes, cannot and should not be allowed to fall directly into the hands of any market participant, who could use that information to gain an advantage over other market participants or over the IOU conducting the procurement. However, it is not an irresolvable conundrum to accommodate both the interest of the IOUs and their bidders in

confidentiality and the need for transparency to afford due process to market participants, especially those that have been unsuccessful in IOU procurement processes.

A model for how these competing interests can be reasonably accommodated is seen in the Amended Protective Order that the Federal Energy Regulatory Commission's (FERC) ALJ McCartney issued in one of the FERC cases addressing the fall-out from the California energy crisis of 2000-2001. In that case, *California PUC v. Sellers of Long Term Contracts*, etc. (Docket Nos. EL02-60-003 and EL02-62-003), attorneys and outside experts retained by any participant to the proceeding were afforded the opportunity to review Protected Materials so long as they executed Non-Disclosure Certificates and were not "Competitive Duty Personnel." The language of this FERC Amended Protective Order, a copy of which is attached hereto, could serve as a basis for amending the existing Protective Order in this proceeding along similar lines. In particular, the parties are directed to paragraphs 8 and 22 through 25 of that Order for particular wording that could be incorporated into the existing Protective Order in this proceeding.

With respect to this concept that is embodied in the FERC Amended Protective Order, PG&E, in its November 5, 2003 Reply to IEP's Response, argued that the Commission should not allow "third parties *one step removed* access to confidential data via attorneys or consultants." (*Id.*, at 4.) PG&E was concerned that this approach provides "too little assurance that the confidential, market sensitive information would not become generally known in the procurement market, or is not misused." (*Id.*) Although, as PG&E points out, "it is impossible as a practical matter to prevent the misuse of confidential information to the advantage of such individual's clients or to the disadvantage of parties with a

proprietary interest in the information” (*id.*), this is a convenient, but not very persuasive, argument. It is impossible to prevent all kinds of bad things from happening in the world, but that does not prevent most of us from going about our daily business. The fact is that any “third party one step removed” from a market participant who is given access to Protected Materials will have to sign a Non-Disclosure Certificate, non-compliance with the terms of which would constitute a violation of law and carry with it very harsh sanctions, including the possibility of imprisonment.

The language of this FERC Amended Protective Order will almost certainly require some word-smithing in order to make it consistent with the language and format of the Protective Order that is currently in effect in this proceeding, and certain existing provisions of the current Protective Order will probably also require some modification in order to allow attorneys and/or outside experts, who are not competitive duty personnel for their clients, to gain access to Protected Materials in this case that are relevant to the SDG&E RFP.

The parties are therefore directed to submit comments to the undersigned within 15 days of the filing of this Ruling on how the concepts embodied in the FERC Amended Protective Order can best be incorporated into the Protective Order that is currently in effect in this proceeding in order to allow attorneys and/or outside experts, who are not competitive duty personnel for their clients, to gain access to Protected Materials in this case that are relevant to the SDG&E RFP. In addition, SDG&E is directed within 10 days of the filing of this Ruling to provide a draft revised Protective Order that incorporates the concepts, discussed above, embodied in the FERC Amended Protective Order. Ideally, within this time, the parties will confer on, and coordinate in, the preparation of the revised version of the Protective Order to be submitted by SDG&E.

IT IS ACCORDINGLY RULED that:

1. The Motion of SDG&E is granted in part, and denied in part.
2. Section 3(b) of the Protective Order in this proceeding shall be modified to add a new subsection (F), to read as follows:

“ . . . any filing, submittal, or testimony pertaining or relating to the bids submitted in response to SDG&E’s May 16, 2003, Grid Reliability Capacity RFP, to the extent that the information in question was designated by the bidders as confidential, proprietary, commercially sensitive or trade secret.”

3. Within 10 (ten) days of the filing of this Ruling, SDG&E shall submit to the Commission a revised redacted version of its October 7, 2003 submittals that un-redacts all bidder-supplied information contained in those submittals that the bidders did not themselves designate as confidential, proprietary, commercially sensitive or trade secret.

4. All of the parties who have submitted confidential information in this proceeding are put on notice that if the information necessary for the Commission to reach a specific finding to support its decision in this matter is information that has been designated and treated, so far, as confidential, the Commission reserves the right under PU Code 583 to make that information public.

5. SDG&E is hereby put on notice that to the extent that bidder-supplied information submitted in response to SDG&E’s RFP that has been designated as confidential is required to be included in a specific finding to support the Commission’s decision in this matter, the Commission may request SDG&E to seek the bidders’ agreement to declassify that information.

6. The Protective Order in this proceeding should be further modified to incorporate a provision allowing outside attorneys and/or consultants to a

Market Participating Party who do not perform any competitive duties for or on behalf of their client, and who have executed a Non-Disclosure Certificate, to have access to Protected Materials relevant to the SDG&E RFP. This modification to the Protective Order should be based on the language of the Amended Protective Order adopted by FERC's Administrative Law Judge McCartney in FERC Docket Nos. EL02-60-003 and EL02-62-003.

7. The parties are directed to submit comments to the undersigned within 15 days of the filing of this Ruling on how the concepts embodied in the FERC Amended Protective Order can best be incorporated into the Protective Order that is currently in effect in this proceeding in order to allow attorneys and/or consultants to a Market Participating Party who do not perform any competitive duties for or on behalf of their client, and who have executed a Non-Disclosure Certificate, to have access to Protected Materials relevant to the SDG&E RFP.

8. SDG&E is directed within 10 days of the filing of this Ruling to provide a draft revised Protective Order that incorporates the concepts embodied in the FERC Amended Protective Order to allow attorneys and/or consultants to a Market Participating Party who do not perform any competitive duties for or on behalf of their client, and who have executed a Non-Disclosure Certificate, to have access to Protected Materials relevant to the SDG&E RFP.

9. The parties should confer on, and coordinate in, the preparation of the revised version of the Protective Order to be submitted by SDG&E.

10. After receipt of the submittals specified in paragraphs 7 and 8 above, a revised Protective Order will be attached to a separate ruling to be issued in this proceeding.

Dated December 1, 2003, at San Francisco, California.

/s/ CHRISTINE M. WALWYN by
LYNN T. CAREW

Christine M. Walwyn
Administrative Law Judge

ATTACHMENT

**UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION**

**Public Utilities Commission of the State of
California**

v.

Docket No. EL02-60-003

**Sellers of Long Term Contracts to the
California Department of Water Resources
California Electricity Oversight Board,**

v.

Docket No. EL02-62-003

**Sellers of Energy and Capacity Under
Long-Term Contracts With the California
Department of Water Resources**

(Consolidated)

AMENDED PROTECTIVE ORDER

(Issued October 1, 2002)

1. This Protective Order shall govern the use of all Protected Materials produced by, or on behalf of, any Participant. Notwithstanding any order terminating this proceeding, this Protective Order shall remain in effect until specifically modified or terminated by the Presiding Administrative Law Judge ("Presiding Judge") or the Federal Energy Regulatory Commission ("Commission").

2. A Participant may designate as protected those materials which customarily are treated by that Participant as sensitive or proprietary, which are not available to the public, and which, if disclosed freely, would subject that Participant or its customers to risk of competitive disadvantage or other business injury.

3. Definitions -- For purposes of this Order:

(a) The term "Participant" shall mean a Participant as defined in 18 C.F.R § 385.102 (b). In addition, although the CDWR and the Governor's Office are not parties to these proceedings, because the subject matter of the dockets is the Long Term Contracts with CDWR, an executive agency which reports to the Governor's Office, CDWR and the Governor's Office have agreed to cooperate with the CEOB and through the CEOB provide responsive documents and other information without the need for a subpoena, subject to this Protective Order. CDWR and the Governor's Office shall thus be considered Participants for the purposes of this Protective Order. Collectively, Complainants CPUC and CEOB, together with CDWR and the Governor's Office, are referred to herein as "the California Government Entities."

(b) (1) The term " Protected Materials" means (A) materials (including depositions) provided by a Participant in response to discovery requests and designated by such Participant as protected; (B) any information contained in or obtained from such designated materials; (C) any other materials which are made subject to this Protective Order by the Presiding Judge, by the Commission, by any court or other body having appropriate authority, or by agreement of the Participants; (D) notes of Protected Materials; and (E) copies of Protected Materials. In the event Protected Materials are produced in hard paper copy, the Participant producing the Protected Materials shall physically mark them on each page as "PROTECTED MATERIALS" or with words of similar import as long as the term "Protected Materials" is included in that designation to indicate that they are Protected Materials. In the event Protected Materials are produced electronically, the Participant producing the Protected Materials shall indicate by label, cover letter or other readily apparent means, that the electronic data (whether transmitted in the form of a CD-ROM, disk, database, website, electronic mail or other electronic means) are "PROTECTED MATERIALS" or with words of similar import as long as the term "Protected Materials" is included in that designation to indicate that they are Protected Materials.

(2) The term "Notes of Protected Materials" means memoranda, handwritten notes, or any other form of information (including electronic form) which copies or discloses materials described in Paragraph 3(b)(1). Notes of Protected Materials are subject to the same restrictions provided in this order for Protected Materials except as specifically provided in this order.

(3) Protected Materials shall not include (A) any information or document contained in the files of the Commission, or any other federal agency, or any federal or state court, unless the information or document has been determined to be protected by such agency or court; or (B) information that is public knowledge, or which becomes public knowledge, other than through disclosure in violation of this Protective Order.

(c) The term "Non-Disclosure Certificate" shall mean the certificate annexed hereto by which Participants who have been granted access to Protected Materials shall certify their understanding that such access to Protected Materials is provided pursuant to the terms and restrictions of this Protective Order, and that such Participants have read the Protective Order and agree to be bound by it. All Non-Disclosure Certificates shall be served on all parties on the official service list maintained by the Secretary in this proceeding, or the restricted service list if applicable.

(d) The term "Reviewing Representative" shall mean a person who has signed a Non-Disclosure Certificate and who is:

- (1) Commission Litigation Staff;
- (2) an attorney who has made an appearance in this proceeding for a Participant and attorneys for CDWR and the Governor's Office, including without limitation, Pierce Atwood and Hawkins, Delafield and Wood;
- (3) attorneys, paralegals, and other employees associated for purposes of this case with an attorney described in Paragraph (2);
- (4) an expert or an employee of an expert retained by a Participant for the purpose of advising, preparing for or testifying in this proceeding;
- (5) a person designated as a Reviewing Representative by order of the presiding Judge or the Commission; or
- (6) employees or other representatives of Participants appearing in this proceeding with significant responsibility for this docket.

4. Protected Materials shall be made available under the terms of this Protective Order only to Participants and only through their Reviewing Representatives as provided in Paragraphs 7, 8, and 9.

5. Protected Materials shall remain available to Participants until the later of the date that an order terminating this proceeding becomes no longer subject to judicial review, or the date that any other Commission proceeding relating to the Protected Material is concluded and no longer subject to judicial review. If requested to do so in writing after that date, the Participants shall, within fifteen days of such request, return the Protected Materials (excluding Notes of Protected Materials) to the Participant that produced them, or shall destroy the materials, except that copies of filings, official transcripts and exhibits in this proceeding that contain Protected Materials, and Notes of Protected Material may be retained, if they are maintained in accordance with Paragraph 6, below. Within such time period each Participant, if requested to do so, shall also submit to the producing Participant an affidavit stating that, to the best of its knowledge, all Protected Materials and all Notes of Protected Materials have been returned or have been destroyed or will be maintained in accordance with Paragraph 6. To the extent Protected Materials are not returned or destroyed, they shall remain subject to the Protective Order.

6. All Protected Materials shall be maintained by the Participant in a secure place. Access to those materials shall be limited to those Reviewing Representatives specifically authorized pursuant to Paragraphs 8 and 9. The Secretary shall place any Protected Materials filed with the Commission in a non-public file. By placing such documents in a non-public file, the Commission is not making a determination of any claim of privilege. The Commission retains the right to make determinations regarding any claim of privilege and the discretion to release information necessary to carry out its jurisdictional responsibilities.

7. For documents submitted to Commission Litigation Staff ("Staff"), Staff shall follow the notification procedures of 18 CFR ' 388.112 before making public any Protected Materials.

(a) Protected Materials shall be treated as confidential by each Participant and by the Reviewing Representative in accordance with the certificate executed pursuant to Paragraph 9. Protected Materials shall not be used except as necessary for the conduct of this proceeding, nor shall they be disclosed in any manner to any person except a Reviewing Representative who is engaged in the conduct of this proceeding and who needs to know the information in order to carry out that person's responsibilities in this

proceeding. Reviewing Representatives may make copies of Protected Materials, but such copies become Protected Materials. Reviewing Representatives may make notes of Protected Materials, which shall be treated as Notes of Protected Materials if they disclose the contents of Protected Materials.

(b) Pursuant to the Order issued by the Chief Judge on September 6, 2002, discovery and documents produced under the protective orders established in the Nevada Power Company complaint proceedings in Docket No. EL02-26-000, *et al.*, the Electric Generation, LLC proceeding, Docket No. ER02-456-000, the Public Utilities Commission of the State of California v. El Paso Natural Gas Company, *et al.*, Docket Nos. RP00-241-000 and RP00-241-006 (with the exception of discovery produced in Docket Nos. RP00-241-000 and RP00-241-006 which was limited to certain parties due to its confidential nature and/or was designated "highly sensitive protected material") and the San Diego Gas & Electric proceeding in Docket No. EL00-95-045, can be used in these proceedings, and shall be considered Protected Material for the purposes of this Order. This provision addresses only the otherwise applicable limitation precluding the use of the referenced documents in proceedings other than the proceedings in which they were produced; parties retain the right to object to the production of or otherwise litigate the relevance or admissibility of any individual document or class of documents.

8. (a) If a Reviewing Representative's scope of employment includes the marketing of energy or natural gas, the direct supervision of any employee or employees whose duties include the marketing of energy, the provision of consulting services to any person whose duties include the marketing of energy or natural gas, or the direct supervision of any employee or employees whose duties include the marketing of energy or natural gas, such Reviewing Representative may not use information contained in any Protected Materials obtained through this proceeding to give any Participant or any competitor of any Participant a commercial advantage.

(b) In the event that a Participant wishes to designate as a Reviewing Representative a person not described in Paragraph 3(d) above, the Participant shall seek agreement from the Participant providing the Protected Materials. If an agreement is reached that person shall be a Reviewing Representative pursuant to Paragraph 3(d) above with respect to those materials. If no agreement is reached, the Participant shall submit the disputed designation to the Presiding Judge for resolution.

9. (a) A Reviewing Representative shall not be permitted to inspect, participate in discussions regarding, or otherwise be permitted access to Protected Materials pursuant to this Protective Order unless that Reviewing Representative has first executed a Non-Disclosure Certificate provided that if an attorney qualified as a Reviewing Representative has executed such a certificate, the paralegals, secretarial and clerical personnel under the attorney's instruction, supervision or control need not do so. A copy of each Non-Disclosure Certificate shall be provided to counsel for the Participant asserting confidentiality prior to disclosure of any Protected Material to that Reviewing Representative.

(b) Attorneys qualified as Reviewing Representatives are responsible for ensuring that persons under their supervision or control comply with this order.

10. Any Reviewing Representative may disclose Protected Materials to any other Reviewing Representative as long as the disclosing Reviewing Representative and the receiving Reviewing Representative both have executed a Non-Disclosure Certificate. In the event that any Reviewing Representative to whom the Protected Materials are disclosed ceases to be engaged in these proceedings, or is employed or retained for a position whose occupant is not qualified to be a Reviewing Representative under Paragraph 3(d), access to Protected Materials by that person shall be terminated. Even if no longer engaged in this proceeding, every person who has executed a Non-Disclosure Certificate shall continue to be bound by the provisions of this Protective Order and the certification.

11. Subject to Paragraph 17, the Presiding Administrative Law Judge shall resolve any disputes arising under this Protective Order. Prior to presenting any dispute under this Protective Order to the Presiding Administrative Law Judge, the parties to the dispute shall use their best efforts to resolve it. Any participant that contests the designation of materials as Protected Materials shall notify the party that provided the Protected Materials by specifying in writing the materials whose designation is contested. This Protective Order shall automatically cease to apply to such materials five (5) business days after the notification is made unless the designator, within said 5-day period, files a motion with the Presiding Administrative Law Judge, with supporting affidavits, demonstrating that the materials should continue to be protected. In any challenge to the designation of materials as protected, the burden of proof shall be on the participant seeking protection. If the Presiding Administrative Law Judge finds that the materials at issue are not entitled to protection, the procedures of Paragraph 17 shall apply.

12. All copies of all documents reflecting Protected Materials, including the portion of the hearing testimony, exhibits, transcripts, briefs and other documents which refer to Protected Materials shall be filed and served in sealed envelopes or other appropriate containers endorsed to the effect that they are sealed pursuant to this Protective Order. Such documents shall be marked "PROTECTED MATERIALS" and shall be filed under seal and served under seal upon the Presiding Judge and all Reviewing Representatives who are on the service list. For anything filed under seal, redacted versions or, where an entire document is protected, a letter indicating such, will also be filed with the Commission and served on all parties on the service list and the Presiding Judge. Counsel for the producing Participant shall provide to all Participants who request the same, a list of Reviewing Representatives who are entitled to receive such material. Counsel shall take all reasonable precautions necessary to assure that Protected Materials are not distributed to unauthorized persons.

13. If any Participant desires to include, utilize or refer to any Protected Materials or information derived therefrom in testimony or exhibits during the hearing in these proceedings in such a manner that might require disclosure of such material to persons other than reviewing representatives, such participant shall first notify both counsel for the disclosing participant and the Presiding Judge of such desire, identifying with particularity each of the Protected Materials. Thereafter, use of such Protected Material will be governed by procedures determined by the Presiding Judge.

14. Nothing in this Protective Order shall be construed as precluding any Participant from objecting to the use of Protected Materials on any legal grounds.

15. Nothing in this Protective Order shall preclude any Participant from requesting that the Presiding Judge, the Commission, or any other body having appropriate authority, to find that this Protective Order should not apply to all or any materials previously designated as Protected Materials pursuant to this Protective Order. The Presiding Judge may alter or amend this Protective Order as circumstances warrant at any time during the course of this proceeding.

16. Each party governed by this Protective Order has the right to seek changes in it as appropriate from the Presiding Judge or the Commission.

17. All Protected Materials filed with the Commission, the Presiding Judge, or any other judicial or administrative body, in support of, or as a part of, a motion, other pleading, brief, or other document, shall be filed and served in sealed envelopes or other appropriate containers bearing prominent markings indicating that the contents include Protected Materials subject to this Protective Order.

18. If the Presiding Judge finds at any time during the course of this proceeding that all or part of the Protected Materials need not be protected, those materials shall, nevertheless, be subject to the protection afforded by this Protective Order for three (3) business days from the date of issuance of the Presiding Judge's decision, and if the Participant seeking protection files an interlocutory appeal or requests that the issue be certified to the Commission, for an additional seven (7) business days. None of the Participants waives its rights to seek additional administrative or judicial remedies after the Presiding Judge's decision regarding Protected Materials or Reviewing Representatives, or the Commission's denial of any appeal thereof. The provisions of 18 CFR § 388.112 shall apply to any requests for Protected Materials in the files of the Commission under the Freedom of Information Act. (5 U.S.C. § 552).

19. Nothing in this Protective Order shall be deemed to preclude any Participant from independently seeking through discovery in any other administrative or judicial proceeding information or materials produced in this proceeding under this Protective Order.

20. None of the Participants waive the right to pursue any other legal or equitable remedies that may be available in the event of actual or anticipated disclosure of Protected Materials.

21. In the event a Participant receives a request to disclose Protected Materials for any reason, including without limitation pursuant to a request made under a public disclosure law or pursuant to discovery in a pending state or federal court litigation, prior to the issuance of a final Commission order no longer subject to rehearing in this docket, in order to be certain of avoiding a violation of the Protective Order, the Participant who received the request to disclose Protected Materials must assert that the Protected Materials sought by the request are exempt from disclosure pursuant to e.g. Government Code § 6254(b), and will notify the Participant which produced the Protected Materials and any Participant which owns or originated the Protected Materials within five business days of the day that that request was made. If a requester initiates legal proceedings to compel disclosure of the Protected Materials, the Party that received the Protected

Materials under this Protective Order will notify the Participant which produced the Protected Materials and any Participant which owns or originated the Protected Materials of such action within five business days thereof, so that the Participant which produced the Protected Materials and any Participant which owns or originated the Protected Materials may seek to defend directly against a request for an order by a Court that the Protected Material should be released to any person that has not executed a Non-Disclosure Certificate. In order to be certain of avoiding a violation of the Protective Order, Participants shall not release Protected Materials to a requestor until and unless there has been entered a binding court order mandating such disclosure. It shall not be a violation of this Protective Order for a Participant to disclose Protected Materials when it is required by court_order to do so and subject to civil or criminal liability if it fails to disclose the Protected Materials. Nothing in this Paragraph is intended to detract from or affect the Commission's jurisdiction under the Federal Power Act, diminish the rights that any Participant may have under the Government Code, or prevent any Participant from contending in any court proceeding that the disclosure of Protected Materials to the requester is precluded by other paragraphs of the Protective Order.

22. The contents of Protected Materials or any other form of information that copies or discloses Protected Materials shall not be disclosed to anyone other than in accordance with this Protective Order and shall be used only in connection with this (these) proceeding(s). Any violation of this Protective Order and of any Non-Disclosure Certificate executed hereunder shall constitute a violation of an order of the Commission.

23. The disclosing Participant may physically mark those Protected Materials that the disclosing Participant believes in good faith contains market sensitive information, public disclosure of which would competitively harm the Participant, with the words "Not Available to Competitive Duty Personnel." Information generated more than six (6) months prior to the date of the adoption of this Protective Order shall not qualify as market sensitive information absent a specific finding of good cause for such a designation by the Presiding Judge. Any challenge to such designations may be made as provided in this protective order for challenges to designations of materials.

24. Solely with respect to Protected Materials that have been marked "Not Available to Competitive Duty Personnel" (and information derived therefrom), a Reviewing Representative may not include any person whose duties include (i) the marketing or sale of electric power or natural gas at wholesale, (ii) the purchase or sale of electric power or natural gas at wholesale, (iii) the direct supervision of any employee with such responsibilities, or (iv) the provision of electricity or natural gas marketing consulting

services to entities engaged in the sale or purchase of electric power or natural gas at wholesale (collectively, "Competitive Duties"). If any person who has been a Reviewing Representative subsequently is assigned to perform any Competitive Duties, or if previously available Protected Materials are changed to "Not Available to Competitive Duty Personnel," with the exception of the Reviewing Representative's own data, such person shall have no such access to materials marked "Not Available to Competitive Duty Personnel" (and information derived therefrom) and shall dispose of such Materials, and shall continue to comply with the requirements set forth in the Non-Disclosure Certificate and this Protective Order with respect to any Protected Materials to which such person previously had access. Notwithstanding the foregoing, persons who otherwise would be disqualified as Competitive Duty Personnel may serve as a Reviewing Representative, subject to the following conditions: (i) the Participant who employs or has retained that person certifies in writing to the affected Producing Party that its ability to effectively participate in this proceeding would be prejudiced if it was unable to rely on the assistance of the particular Reviewing Representative; (ii) the party claiming such prejudice must identify by name and job title the particular Reviewing Representative required; (iii) the party claiming such prejudice must acknowledge in writing to the affected Producing Party that access to the Protected Materials which are Not Available to Competitive Duty Personnel shall be restricted only to purposes of the litigation of this proceeding, absent prior written consent of the Producing Party or authorization of a decisional body (the Commission or the Presiding Administrative Law Judge with opportunity for the Producing Party to seek review of such decision as provided in this order); (iv) such party acknowledges that any other use shall constitute a violation of an order of the Federal Energy Regulatory Commission; and (v) the Competitive Duty Personnel acting as a Reviewing Representative has provided a declaration or affidavit acknowledging his or her familiarity with the contents of this order and the particular restrictions set forth in this paragraph. Once materials are clearly and correctly labeled, compliance shall be the responsibility of the Reviewing Party. Materials marked as "Not Available to Competitive Duty Personnel" shall be returned or destroyed at the conclusion of proceedings as otherwise provided for herein.

25. If a Participant believes that Protected Materials previously distributed to Reviewing Representatives contain market sensitive information, public disclosure of which would competitively harm the Participant, and should be treated as if it had been labeled "Not Available to Competitive Duty Personnel", the Participant must e-mail Participants on the restricted service list and the ListServe established for email addresses in this proceeding, specifically state which documents contain such data, make an informal showing as to why such data should be subject to the restrictions applicable to

documents labeled “Not Available to Competitive Duty Personnel”, and seek their consent to such treatment, and such consent shall not be unreasonably withheld. If no agreement is reached concerning the designation of previously distributed material as “Not Available to Competitive Duty Personnel”, the Participant shall submit the dispute to the Presiding Judge. If previously distributed material is subsequently designated as “Not Available to Competitive Duty Personnel”, it will be the responsibility of the Reviewing Party to ensure compliance with this order thereafter – the Producing Party will not be responsible for redistributing or re-labeling the documents or data.

SO ORDERED.

Bobbie J. McCartney
Presiding Administrative Law Judge

**UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION**

**Public Utilities Commission of the State of
California**

v.

Docket No. EL02-60-003

**Sellers of Long Term Contracts to the
California Department of Water Resources
California Electricity Oversight Board,**

v.

Docket No. EL02-62-003

**Sellers of Energy and Capacity Under
Long-Term Contracts With the California
Department of Water Resources**

(Consolidated)

NON-DISCLOSURE CERTIFICATE

I hereby certify my understanding that access to Protected Materials is provided to me pursuant to the terms and restrictions of the Protective Order in this proceeding, that I have been given a copy of and have read the Protective Order, and that I agree to be bound by it. I understand that the contents of the Protected Materials, any notes or other memoranda, or any other form of information that copies or discloses Protected Materials shall not be disclosed to anyone other than in accordance with that Protective Order. I acknowledge that a violation of this certificate constitutes a violation of an order of the Federal Energy Regulatory Commission.

By: _____

Title: _____

Representing: _____

Date: _____

**UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION**

**Public Utilities Commission of the State of
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Long-Term Contracts With the California
Department of Water Resources**

(Consolidated)

NON-DISCLOSURE CERTIFICATE OF COMPETITIVE DUTY PERSONNEL

I hereby certify my understanding that access to Protected Materials identified as “Not Available to Competitive Duty Personnel” is provided to me pursuant to the terms and restrictions of the amended Protective Order in this proceeding, that I have been given a copy of and have read the amended Protective Order, and that I agree to be bound by it. I understand that the contents of such Protected Materials, any notes or other memoranda, or any other form of information that copies or discloses Protected Materials shall not be disclosed to anyone other than in accordance with that Protective Order. I further understand that access to Protected Materials identified as Not Available to Competitive Duty Personnel shall be restricted only to purposes of the litigation of this proceeding. I acknowledge that a violation of this certificate constitutes a violation of an order of the Federal Energy Regulatory Commission.

By: _____

Title: _____

Representing: _____

Date: _____

(END OF ATTACHMENT)

CERTIFICATE OF SERVICE

I certify that I have by mail, and by electronic mail to the parties to which an electronic mail address has been provided, this day served a true copy of the original attached Administrative Law Judge's Ruling On San Diego Gas & Electric Company's Motion To Amend Protective Order on all parties of record in this proceeding or their attorneys of record.

Dated December 1, 2003 at San Francisco, California.

/s/ JANET V. ALVIAR

Janet V. Alviar

N O T I C E

Parties should notify the Process Office, Public Utilities Commission, 505 Van Ness Avenue, Room 2000, San Francisco, CA 94102, of any change of address to ensure that they continue to receive documents. You must indicate the proceeding number on the service list on which your name appears.

The Commission's policy is to schedule hearings (meetings, workshops, etc.) in locations that are accessible to people with disabilities. To verify that a particular location is accessible, call: Calendar Clerk (415) 703-1203.

If specialized accommodations for the disabled are needed, e.g., sign language interpreters, those making the arrangements must call the Public Advisor at (415) 703-2074, TTY 1-866-836-7825 or (415) 703-5282 at least three working days in advance of the event.

R.01-10-024 CMW/jva
Docket Nos. EL02-60-003 and
EL02-62-003

15